IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. [illegible]

W. O. JOHNSON,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,

Memorandum of Respondent, the Southern Pacific Company, in Opposition to the Application of Petitioner for a Writ of Certiorari, and to the Motion of the United States for Leave to Intervene.

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Memorandum of Respondent, the Southern Pacific Company, in Opposition to the Application of Petitioner for a Writ of Certiorari, and to the Motion of the United States for Leave to Intervene.

This is an ordinary suit for damages for personal injuries sustained by petitioner while in the employ of the Southern Pacific Company, as a brakeman, in consequence of the alleged negligence of respondent in failing to equip its engine and car with automatic couplers that would couple by impact, in accordance with the Act of Congress of March 2, 1893, the material parts of which are as follows:

"AN ACT to promote the safety of em-

ployees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes.

"SECTION 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train brake system. * * *

"SEC. 2. That on and after the first day of January eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. * * *

"SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled

or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation. * * *

"SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

27 Stat., c. 196, p. 531.

This suit was instituted in the District Court of Box Elder County, Utah, on October 6, 1900, and was removed to the Circuit Court of the United States for the District of Utah, where it was tried on June 29, 1901, and resulted in a verdict for the defendant, on an instruction given the jury at the instance of defendant, at the close of plaintiff's evidence, and a judgment was entered accordingly, which was affirmed by the Circuit Court of Appeals, for the Eighth Circuit, on August 28, 1902. No motion for a rehearing was ever filed by plaintiff.

The pleadings are fairly described in petition-

er's application. The facts developed at the trial were as follows: On the morning of the accident to plaintiff, August 5, 1900, an east-bound through passenger train running between San Francisco and Ogden, being behind time, dropped the dining car "Del Monte" at Promontory, Utah, a small town west of Ogden, in order that it might be picked up by the 5 o'clock P. M. west-bound through California passenger train, as it could not reach Ogden in time to return on that train. As the conductor of the dining car desired to have it turned around so that the kitchen part thereof would be in the rear of the west-bound train, he had the train despatcher at Ogden telegraph the conductor of a west-bound through freight train, running between Ogden and Carlin, to turn the car around. When this freight reached Promontory, where the dining car was standing on a side track, plaintiff, who was head brakeman on this freight train, and an experienced railroad man (as he had been engaged in railroading about twelve years, six of which were in defendant's service, two years as engine wiper, two years as fireman and two years as brakeman) was directed by the conductor of his train to detach the engine from his train, run it

forward and couple it to the dining car and haul it to the turn table, there to be turned around. In pursuance of this order, he disconnected his engine from the train, ran ahead of it and threw a switch to let it in on the sidetrack on which the dining car was standing (Record, p. 14); but when the front of the engine reached the dining car, he saw that he could not make an automatic coupling therewith, because the engine was equipped with a Janney coupler and the dining car was equipped with a Miller hook coupler. While both these couplers are automatic in their construction (Record, pp. 14 and 21), they will not work together for the reasons stated by plaintiff himself, "that the Miller hook is on the same side as the Janney and, instead of coupling, passes over it." (Record, pp. 16 and 23). He therefore proceeded to make the coupling with a link and pin, the customary way in such cases. He at the same time observed that the coupler on the dining car was slightly tipped, by reason of some bolts—which kept the carrying iron on which it rested in place—being loose, which rendered the coupling a little more difficult than it would otherwise have been; but that fact would not have constituted a defect had the car been

used in conjunction with another Miller hook coupler, with which it would have worked all right; that while fully conscious of the danger of making such a coupling, he did not regard the slight tipping of the Miller coupler of sufficient consequence to report it to his conductor or the yardmaster, as he acknowledged that it was his duty under the printed rules and regulations of defendant to have done, a copy of which he had been furnished with and with which he was perfectly familiar. As the first attempt to make the coupling failed, he tried it again, and again failed; then tried it the third time, and his arm was caught between the bumpers and crushed. He stated that he had made the same kind of a coupling a hundred times before and well knew its dangers.

We desire here to correct an inaccurate statement of fact made by counsel for petitioner, on page 5 of his supplemental statement, to the effect that plaintiff Johnson was unfamiliar with the "Miller" coupler. Johnson himself testified (see Record, p. 14):

> "I have made the same kind of coupling before hundreds of times;"

And again at page 15 of the Record;

"Q. Did you know the difficulties in regard to coupling cars? A. Yes sir, I knew what the difficulty of the coupler was because it was a Janney and a Miller and I most certainly knew that it was a 'difficulty coupler.' It was dangerous to go between those cars, but I was ordered to do it. I knew that it was a dangerous coupler, but I was taking my time. I was trying three different times."

The opinion of the Circuit Court of Appeals was written by Judge SANBORN and concurred in by Judges THAYER and LOCHREN, Judge THAYER, however, dissenting from that part of the opinion which held that the Act of Congress did not apply to engines and that the dining car was not engaged in interstate traffic at the time of the accident, but agreed to an affirmance of the judgment on the ground that the evidence showed that both the engine and dining car were, in fact, equipped with automatic couplers, though of a different pattern, and that inasmuch as the Act of Congress did not prescribe the kind of coupler to be used, that the equipment of the engine and car with any kind of an automatic coupler was a substantial compliance with the Act. The opinion speaks for itself, and seems to be unanswerable.

Inasmuch as the Statute (*March 3, 1891; C. 617, p. 36, U. S. Stat.*) creating the Circuit Court of Appeals, provides that decisions of that Court shall be final in actions of this character, unless this Court, in the exercise of its supervisory power, sees fit to require, by *certiorari* or otherwise, that the case be certified to it for review and consideration, and this Court has on several occasions declared that this power will be sparingly exercised, and "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State, or some matter affecting the interest of this Nation, in its internal or external relations, demand such exercise" (*Forsyth vs. Hammond, 166 U. S., 514*), it behooves us to inquire whether petitioner has brought himself within the exception.

The reasons assigned by him for invoking the aid of this extraordinary remedy are:

1. That great injury has been done him by the error of the Court of Appeals in affirming the judgment.

2. That the case is one of great public im-

portance because the question of when a car is engaged in interstate commerce, is involved.

3. That many similar cases have arisen under the Act.

4. That there is a conflict of decision as to the meaning of the Act.

Of these reasons in their order:

As to the first of these reasons we have to say, that it is not to be found in the specification of reasons prescribed by this Court for its interference. It is only when "some matter affecting the interest of the nation in its internal or external relations demands such exercise," that it will be exercised. The power to finally determine controversies of this sort must of necessity be lodged somewhere, and the law makers have declared that it shall be in the Court of Appeals in this instance. Petitioner has not only had his day in court, but has had the benefit of the decision of a reviewing court on appeal. The mere fact that he claims that the Court of Appeals erred in its construction of this statute, is no reason for giving him a right not awarded to every other litigant, viz., the benefit of a second appeal.

Moreover, the fact that he did not file a motion

for a rehearing in this case, and thus give the Court of Appeals an opportunity to correct its errors, if any were committed, ought, it seems to us, estop him from claiming any such extraordinary relief as is here sought.

In many jurisdictions such a prerequisite is prescribed, and it is certainly a reasonable condition.

In re Huddleston, 31 So., 147.

The second reason assigned, viz., that the case is one of great public importance, because the question of when a car is engaged in interstate commerce is involved, is likewise insufficient to call forth this extraordinary power.

The mere fact that the negligence of defendant consisted of the alleged violation of an Act of Congress and that the Court of Appeals was called upon to construe such an Act, does not distinguish this case from thousands of others in which violations of other Acts of Congress, State Laws and City Ordinances, regulating the operation of railroads, are necessarily involved.

We venture the assertion, that where one life is lost or injury inflicted by the alleged violation of the Statute in question, fifty are lost or inflicted by alleged violations of State Laws or City Ordinances.

So that the importance of the principles involved in this case, is considerably dwarfed by comparison.

Of course, we are far from contending that Statutes of this character are not important. Any law which has for its purpose the protection of human life falls within that category. We are simply contending that the principles involved in this case are not so far out of the ordinary run of cases as to deserve exceptional treatment.

But however this may be, the question broached is not a novel one, for the opinion of the Court of Appeals in this case is based upon several decisions of this Court, which define the characteristics of interstate commerce and traffic. The leading case, and one which is cited oftener than any other is *Coe vs. Town of Errol, 116 U. S., 517.* The doctrine of that case has been steadfastly adhered to by this Court and has only recently been cited again with approval in the case of *Diamond Glue Co. vs. U. S. Glue Co., 187 U. S., 616.* Copious extracts from it are incorporated in the opinions of this Court in the cases of

Kidd vs. Pearson, 128 U. S., 24, and
U. S. vs. E. C. Knight Co., 156 U. S., 13.

It is also sustained by the rulings of this Court in the cases of

Smith vs. Alabama, *124 U. S.*, *482*,
St. Louis vs. Ferry Co., *11 Wall.*, *431*.
Morgan vs. Louisiana, *118 U. S.*, *465*.
Pullman Co. vs. Pa., *141 U. S.*, *25*.
Postal Tel. Co. vs. Adams, *155 U. S.*, *698*.
Adams Ex. Co. vs. Ohio, *165 U. S.*, *194*.
Am. Ref. Trans. Co. vs. Hall, *174 U. S.*, *70*.

See also cases of

Norfolk, etc., Ry. vs. Commonwealth, *24 S. E.*, *838*,
U. S. vs. Boyer, *85 Fed.*, *432*,
Kelley vs. Rhoads, *63 Pac.*, *935*,
Cottling vs. Stock Yds., *82 Fed.*, *844*,
Union Trans. Co. vs. Lynch, *55 Pac.*, *643*,

in all of which the interstate character of vehicles and freight is discussed.

The third reason, viz.: that many similar cases have arisen under this Act, if true, does not concern petitioner. No specification of the cases referred to, or the places where pending, is made, hence this reason must of necessity be treated as a mere generality.

The last reason, viz.: that there is a conflict

of decision as to the meaning of the Act, does not argue that the decision of the Court of Appeals is erroneous. There are only four cases cited by petitioner which it is claimed are in conflict with the decision in this case, viz.: *Mallott, Recr., vs. Hood, 99 Ill. App., 360; Fleming vs. Ry., 131 N. C., 476; Winkler vs. Ry., 53 Atl., 90; and Voelker vs. Ry., 116 Fed. Rep., 867.*

An examination of these cases will, we think, convince the Court that there is no real conflict between them and the decision of the case at bar.

It is perhaps inaccurate to say, that they *conflict* with the case at bar, for none of them was in a Court that would be governed by the decisions of the Court of Appeals, with the possible exception of the *Voelker* case, *116 Fed. Rep., 867*, which was decided by District *Judge Shiras* on the Circuit, and whose observations on the subject were pure dictum, because the car in controversy there was laden with interstate freight, and was so stated by him to be.

The *Mallott* case, *99 Ill. App., 360*, was decided by an inferior State Court of Appeals, but with all that, there is nothing in it that militates against the ruling in this case.

It simply held that the failure to prove that

the car in question contained interstate freight was not a fatal error, when it appeared that "the train of which the car in question was a part was engaged in interstate commerce, carrying stock and merchandise from one State to another; and the car itself was attached where the train was made up, at East St. Louis and *billed through* to Indianapolis."

The Interstate Commerce Act was not involved in the *Fleming* case, *131 N. C., 476*, but the doctrine of that case is at war with every other case on the subject, because it holds that at common law the failure to equip locomotives with automatic couplers is negligence *per se*.

The *Winkler* case, *53 Atl., 90*, simply contains the charge to a jury of the Judge of the Superior Court. As the coupling in the case at bar was made to the front end of the engine (Record, p. 14) and not to the tender, the charge that the *tender* was a car is inapplicable.

None of these cases are supported by the logical reasoning of the learned Judge who wrote the opinion in this case. We feel confident that the mere reading of the opinion will be sufficient to convince this Court that no other conclusion could have been reached by that Court. It re-

quires but a superficial glance at the Act in question to see that it does not require the equipment of locomotive engines with automatic couplers. The first section of the Act applies to locomotives only, and simply requires them to be equipped with power *brakes*. The second section applies to *cars* only, and requires them to be equipped with *automatic couplers*. Nothing whatever is said about *couplings* on the *engines*.

The title to the Act also observes this distinction, viz.: "to equip their *cars* with automatic *couplers* and their *locomotives* with driving wheel *brakes*."

As this is a penal Statute (see Sec. 6), it must needs receive a strict construction.

The necessity however for settling these questions has been obviated by the amendment of the act in question at the last session of Congress (33 Stats., 943, March 2, 1903), so as to include engines and make it applicable to all kinds of couplers. The new Act reads as follows:

> "AN ACT to amend an act entitled 'AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers

and continuous brakes, and their locomotives with driving-wheel brakes and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the provisions and requirements of the Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons and the height of drawbars shall be held to apply to all trains, locomotives, ten-

ders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways. * * *

"SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as

specifically amended by this Act, apply to this Act.

Public No. 133, approved March 2, 1903, Second Session, Fifty-seventh Congress."

This amendment following so close upon the decision of this case, is strong persuasive evidence that the Act was defective in these particulars, and, in our judgment, completely vindicates the action of the Court of Appeals in deciding this case as it did.

All of the foregoing observations apply with equal force to the suggestion of the Solicitor-General of the United States, that he be permitted to intervene in this case. We, however, desire to add that it would seem as if the proper time for the Government to file an application for intervention was after the case had reached this Court and that the practice of the United States in asking to intervene in this Court before the case gets here should not be encouraged. The time for the Government to ask leave to intervene is after the writ of certiorari is issued (in case the petition is granted) and not before.

The case is not one of such great public con-

cern as to justify this Court in resorting to this extraordinary remedy. If there was any doubt about the correctness of the Court of Appeals' conclusions, it has been removed by the legislation above referred to. No good or useful purpose can be subserved by granting a review of this case. If the Interstate Commerce Commission wishes to further test the old law, the door is open to it to do so by direct methods, viz.: a suit to recover the penalties provided for violating the Act, in the manner prescribed by Section 6 of the Act itself.

It is therefore respectfully submitted that the petition should be denied.

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